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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN PAUL COLEMAN,

Defendant and Appellant.

G032768

(Super. Ct. No. 99NF3457)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil P. Gonzalez and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Paul Coleman was convicted of embezzling money from attorney Daniel Conforti. He contends the court erred in excluding a secretly-recorded conversation he had with Conforti, and in counseling the jury not to take secret ballots. We reject these contentions and affirm the judgment.

* * * *

Coleman and Conforti met in law school, and when Conforti graduated he opened an office and hired Coleman as his paralegal and office manager. Coleman was to receive \$2,500 per month in salary, plus half the profits. Upon passing the bar, he was expected to become Conforti's partner.

In addition to practicing law, Conforti also taught high school and was involved in various other activities. Therefore, Coleman handled most of the day-to-day operations of the office. Although Conforti was the only signatory on the office checking account, he authorized Coleman to sign his (Conforti's) name on checks for all general business expenses, including Coleman's compensation. Coleman managed the account and recorded account transactions on his computer. Conforti did not have access to these records, but Coleman gave him financial updates from time to time, and at year's end he prepared an informal financial statement that Conforti used in filing his taxes.

Over time, the office flourished and Coleman passed the bar. However, instead of becoming Conforti's partner, Coleman decided he wanted to open his own law office. It wasn't until Conforti saw an advertisement for Coleman's law office that he knew of Coleman's intentions. Around this time, Conforti learned that one of his office's checks had bounced. Upon reviewing his bank records, he discovered that within the past two months, Coleman had written checks to himself for personal expenses exceeding \$20,000. When Conforti confronted Coleman about this, Coleman was apologetic. He also admitted he misappropriated an additional \$5,000 from Conforti's office. However, he promised Conforti he would "make it up" to him. Conforti fired Coleman, closed the office checking account and contacted the police.

Investigators discovered Coleman had misidentified the recipients of approximately 75 office checks. The bulk of those checks were actually made out to Coleman, meaning he wrote the checks to himself but recorded them as having been paid to someone else. Investigators determined Coleman stole \$184,514.63 during the time he

worked for Conforti. They also discovered he had failed to file his tax returns during this period.

At trial, Coleman represented himself but did not testify. He tried to establish that his base salary was actually greater than \$2,500 per month and that he was entitled to the money he took because he did most of the work in the office. The jury was not persuaded. It convicted him of grand theft, falsifying records and tax evasion. It also found he stole over \$50,000 and engaged in a pattern of fraudulent conduct involving the taking of more than \$100,000. For these transgressions, the trial court sentenced Coleman to 28 months in prison.

I

Coleman contends the court erred in excluding a secretly-recorded phone conversation he had with Conforti. He argues the conversation was admissible to impeach Conforti, but we uphold the court's ruling.

The phone conversation first came up while Coleman was cross-examining Conforti about a civil judgment he obtained against Coleman for his misappropriation of office funds. Conforti admitted telling Coleman that he would be willing to accept \$75,000 as full payment of the judgment. However, he said he did not recall discussing Coleman's criminal case. Coleman then asked him, "You didn't tell me that you had spoken to the district attorney at that time and that you were pretty confident for the \$75,000 that this case would go away?" Conforti replied, "No, I said I would settle the civil case." Conforti also denied telling Coleman that he wanted the settlement money designated as emotional damages for tax purposes. At that point, Coleman sought to introduce a tape recording of the phone call.

The court discussed the tape with counsel outside the presence of the jury. Coleman admitted he did not inform Conforti he was recording their conversation or produce the tape to the prosecutor during the course of discovery. Nonetheless, he argued the tape was admissible to impeach Conforti, because "in the recording [Conforti]

clearly says he can make this case go away for the 75,000.” Concerned that Coleman was trying to “ambush” the prosecutor, the court denied his request to introduce the tape. The court found: (1) Coleman should have disclosed the tape during discovery; (2) he failed to lay a proper foundation for its introduction; and (3) it may constitute an illegal recording.

The court ordered Coleman “not to bring [the tape] up unless and until [the prosecutor] reviews it, a foundation is laid outside the presence of the jury as to its authenticity, and the court rules on its admissibility.” Coleman then turned the tape over to the prosecutor for analysis. When proceedings resumed, the court told the jury that Coleman had acted prematurely in attempting to introduce the tape. The court also instructed the jury to disregard the tape and assume it did not exist.

Later on, the court revisited the issue and the prosecutor stated the tape appeared authentic. Coleman said he made the tape because he believed Conforti was trying to extort money from him in exchange for dropping the criminal case. Regardless of this, the court ruled the tape was inadmissible because it constituted “impeachment on a collateral matter” and amounted to an offer to compromise. Coleman offered to redact the tape to eliminate any reference to an offer of compromise. He said Conforti’s representation to make the criminal case go away was all the jury needed to hear to assess his credibility. However, the court believed the tape would “sidetrack[] the jury from the main issues” and excluded it from the trial.

Coleman asserts this decision violated the rules of evidence, as well as his right to due process. We do not agree.

Evidence Code section 1153.5 provides, “Evidence of an offer for civil resolution of a criminal matter pursuant to the provisions of Section 33 of the Code of Civil Procedure, or admissions made in the course of or negotiations for the offer shall not be admissible in any action.” Section 33 authorizes a prosecuting attorney to assist in

the civil resolution of certain criminal violations, including grand theft and falsification of records, in lieu of filing a criminal complaint. (Code Civ. Proc., § 33.)

Coleman claims Evidence Code section 1153.5 is inapt because it “clearly was designed to protect a defendant from having a civil offer to compromise employed by a prosecutor as an admission of guilt[.]” He does not believe the statute should be construed to exclude statements that could assist a criminal defendant in his defense. But there is nothing in the statute itself that prohibits such a construction. Consistent with the public policy to encourage civil compromises, the statute makes any offer to compromise criminal matters involving theft inadmissible in any action. That way, both sides are protected from having an offer used against them at a later date. Given the plain language of the statute, and the public policy behind it, we find Conforti’s statements were inadmissible under Evidence Code section 1153.5.

Were we to accept Coleman’s position, prosecutors would be reluctant to enter into such one-sidedly dangerous discussions, and the statute would soon atrophy from lack of exercise. So both the plain language of the statute and the policy behind it militate against Coleman’s position.

Conforti’s statements were also inadmissible under Penal Code section 632.¹ That section criminalizes the surreptitious recording of confidential communications and precludes the admission of evidence obtained as a result of such a recording, except in a prosecution for illegal wiretapping. (Pen. Code, § 632, subds. (a) & (d).) However, “Nothing in Section . . . 632 . . . prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion” (Pen. Code, § 633.5.)

¹ Although the trial court did not rely on this section in excluding the offer, we must uphold the trial court’s decision if it is correct on any basis. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; *Florio v. Lau* (1998) 68 Cal.App.4th 637, 653 [appellate court reviews results, not reasoning].)

At trial, Coleman invoked the extortion exception, but the tape recording does not contain any evidence of that crime.² Early in the recording, Coleman told Conforti, “I am not opposed to meeting with you to see if there’s a way we can civilly compromise our differences.” Conforti said he wanted \$75,000 as “a global settlement,” meaning “we walk away and it’s done. Everything is done.” The deal not only encompassed the parties’ civil suit, Conforti also said he would try to help Coleman with a matter he had pending before the state bar. In addition, Conforti said he would be willing to let the district attorney know that he and Coleman had reached an agreement. Conforti said he couldn’t guarantee the district attorney would drop the case, but he was “very confident” that he would do so.

Completely absent from the conversation is any evidence that Conforti wrongfully threatened Coleman in any fashion. And that is the crux of the crime of extortion; it is “the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear” (Pen. Code, § 518.) Throughout the conversation, both Conforti and Coleman speak in terms of negotiating a civil compromise of their dispute. While their negotiations encompassed both the civil case and the criminal case, there is nothing in this which transcends legitimate settlement negotiations or even approaches threats against Coleman. Rather, Conforti simply agreed to facilitate the resolution of that case in exchange for Coleman’s promise to pay. This is precisely the type of compromise that Evidence Code section 1153.5 seeks to encourage and protects from disclosure. Accordingly, the extortion exception was inapplicable, and the tape was subject to exclusion under Penal Code section 632.

Despite these statutory bars to admission of the tape recording, Coleman argues he had a constitutional right to have the jury hear it. Relying on Due Process and Sixth Amendment principles, he contends he had a right to confront Conforti about the

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We granted Coleman’s request to augment the appellate record with a transcript of the recording.

tape because it impugned his credibility and revealed his motive for going to the police. But the tape, viewed in its totality, is not nearly as helpful to the defense as Coleman makes it out to be.

Most significantly, the tape does not contain any information about the underlying crimes. It simply represents an attempt by Coleman to bait Conforti into making statements that might make him look bad. However, Coleman did not succeed in this regard. It would be one thing if the tape recording showed Conforti was attempting to use the criminal process to extort money from Coleman, but as we have explained, the recording does not indicate that. Indeed, Conforti agrees to take *less* than he was entitled to. Conforti's promise to speak with the district attorney about dropping the criminal case does not, as Coleman alleges, constitute a veiled threat or extortion.

Admittedly, the tape did have some impeachment value, in that it contradicted Conforti's testimony that he only spoke with Coleman about the civil case. But we do not believe the tape would have put Conforti's testimony in an entirely different light or that its exclusion can reasonably be said to have infringed Coleman's constitutional rights. "Although the right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination.' [Citation.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) We cannot say the trial court abused its discretion in this instance.

II

Coleman also contends the trial judge committed misconduct by dissuading the jury from taking any secret ballots. We disagree.

At the end of his charge to the jury, the judge stated, "The last suggestion that I have to you before you begin your deliberations is that you not take secret ballots on any issues in the case because it seems to me your goal is to attempt to resolve the case if you can during your deliberations[.] [I]f there is anybody that's disagreeing with

you as to the facts, how they should be interpreted, what the result of the application of the law to the facts is, or what your verdict should be, we'd all be best served if you knew who it was that was disagreeing with you so you could isolate the point of disagreement and talk it out if at all possible. [¶] Again, that's just my suggestion[.]”

Because Coleman failed to object to this instruction, he has waived his right to challenge it now, except to the extent it impaired his substantial rights. (See Pen. Code, § 1259.) Coleman argues the instruction invaded the deliberative process of the jurors and improperly advised them that their goal was to reach a verdict. However, the court repeatedly couched its remarks in terms of a “suggestion.” Thus, the jurors were free to conduct secret ballots if they so desired. There was no improper meddling in the deliberative process. (Compare *People v. Engelman* (2002) 28 Cal.4th 436 [condemning instruction which obliged jurors to police the reasoning and argument of their fellow jurors].)

Nor was there anything improper about the court encouraging the jury to reach a verdict. In Coleman's opinion, this could have led to browbeating by the majority jurors, but that is highly unlikely given the entirety of the court's charge. The judge told the jurors they must determine the facts from the evidence, apply the law as given, “and in this way arrive at your verdict.” (CALJIC No. 1.00.) He also instructed them of their obligation to decide the case for themselves and not to decide a particular way because a majority of the jurors favored such a decision. (CALJIC No. 17.40.) Viewed in context with these instructions, we find nothing inherently coercive or unfair

about the judge's urging that they "resolve the case if you can." Although we see no great advantage to this advice, it is not cause for reversal.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.